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REDRESS FOR SEXUAL VIOLENCE BEFORE THE INTERNATIONAL CRIMES TRIBUNAL IN BANGLADESH: LESSONS FROM HISTORY, AND HOPES FOR THE FUTURE

I INTRODUCTION

The recent establishment of a special tribunal with jurisdiction over genocide, crimes against peace, crimes against humanity and war crimes in Bangladesh has followed persistent activism from civil society demanding accountability for the crimes of violence committed during the liberation war of 1971. Constituted under the International Crimes (Tribunals) Act 1974, as amended in 2009,¹ and envisaging the prosecution of among others, 'international crimes',

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This article is dedicated to two women and their contributions to justice for women survivors of crimes against humanity, first, to Rhonda Copelon, who so brilliantly developed human rights law to encompass women's experiences of violence in conflict situations globally, and second, to Firdausi Priyabhashini, whose courage and conviction have helped to transform the understanding of women's experiences of sexual violence in the Bangladesh war of liberation, and to keep alive the demand for accountability. Sara's thanks also go to Rokeya Chowdhury for research assistance. We both thank the anonymous reviewers for their comments and Suzannah Linton for her strong editorial support.

¹ The International Crimes (Tribunals) Act 1973 as amended by the International Crimes (Tribunals) (Amendment) Act 2009 (2009) (Bangl.) [hereinafter 1974 Act].

this is a domestic tribunal, established under domestic law. While the initiative to move forward with trials has been widely welcomed in Bangladesh as a long-overdue recognition of the need to address the issue of impunity for gross violations of human rights, there remain concerns about the resources and capacity of the tribunal to carry out its mandate. We believe it is important to address these questions early on, precisely in order to ensure that the Tribunal receives the necessary human, financial and technical resources needed for it to function. In this paper, we focus on one aspect of this larger question, and discuss how the Tribunal may address the issue of crimes of sexual violence during 1971, as well as possible strategies for addressing, and overcoming these challenges.

We believe that the Tribunal needs to be aware, as it commences its work, of the concerns and questions regarding the gaps between the theory and practice of prosecuting sexual violence, and the challenges to attaining gender justice, as seen through the experience of the various international crimes trials² and transitional justice mechanisms³ to date. In particular the Tribunal needs to consider how the realisation of 'justice' in practice may contrast with the pervasive and continuing injustices and disorder that mark local realities, and how it may impact on women's lives. To give one example, the existing documentation on the 1971 war in Bangladesh frequently alludes to the numbers of women who were sexually assaulted and raped.⁴ While such references emphasise the enormity of the incidence of atrocities against Bengali women⁵ for justice and

² See Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997); Christine Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335–41 (2001).

³ Susan Harris-Rimmer, *Gender and Transitional Justice: the Women of East Timor* (2010); Report of the Sierra Leone Truth and Reconciliation Commission, *Truth and Reconciliation Commission, Sierra Leone, Witness to Truth* (2004).

⁴ However, various other experiences of women – as freedom fighters themselves, as refugees and displaced from their land, as widows/single women, left behind to look after the families, as mothers who urged their men to fight for the nation – were largely silenced or perceived as not worthy of receiving much attention in the post-war Bangladesh, and have only begun to be discussed or documented in recent years.

⁵ Meghna Guhathakurta, *Women's narrative from the Chittagong Hill Tracts*, in *Women, War and Peace in South Asia: Beyond Victimhood to Agency* 252 (Rita Manchanda ed., 2001); Amena Mohsin, *The Politics of Nationalism: The Case of the Chittagong Hill Tracts Bangladesh* (2d ed., 2002). See also generally, Narir Ekattur, *O Juddhyo Porobortee Kothyokahini* [Women's '71 and Post-War Narratives] (Ain o Salish Kendra ed., 2001) [hereinafter Narir Ekattur].

accountability, they did not elaborate on the scope and extent of crimes of sexual violence.⁶ Thus, women's experiences of sexual violence during the war were, until very recently, largely depicted in the language of loss or harm to the nation, and an assault on the community's *izzat* (honour).⁷ Consequently, while present in the narrative, the details of the lived and individual experiences of women and girls who underwent sexual violence, remained largely absent both from contemporaneous documents, and from later demands for justice and accountability.

While establishing procedures for the trial of accused perpetrators of atrocity in Bangladesh, it will be important for the Tribunal to consider whose experiences would be taken into account, and how to do so. If survivors, whether men or women, who have experienced significant gender-based violence during the war of 1971, come forward to testify, how will the Tribunal ensure that they are not further victimised/traumatised by doing so? How would accountability through a formal trial sit with the scope for recuperation, restoration or 'healing' of the survivor? Given the risks involved for individual survivors, including disruption of lives settled in the passage of four decades since the war, would prosecutions before the Tribunal serve their individual interests, or the broader community interest in remembering or learning from the experience of sexual violence in the war? If it does benefit, what kind of safeguards would need to be in place?

We argue that in developing its approach and priorities for addressing sexual violence, the Tribunal could draw upon three earlier national experiences, set two decades apart, of addressing gendered violence during the war, by the Bangladesh State and sections of civil society respectively. The first two, in the immediate aftermath of the war, in 1972, involved a scheme undertaken for rehabilitation of 'Birangonas' or the 'war heroines' (rape survivors) and another to enable adoption of 'war babies'. The third experience, in 1992, involved women rape survivors giving testimony at an informal public hearing convened by the 'Peoples' Tribunal for Elimination for War Criminals and Collaborators'. The Tribunal could examine these experiences, not only to identify the nature of

⁶ See generally, Bina D'Costa, *Nationbuilding, Gender, and War Crimes in South Asia* (2010).

⁷ See Lynn Welchman & Sara Hossain, "Honour": *Crimes, Paradigms and Violence against Women* (2005) (for further exploration on *izzat*/honour). See also Rubaiyat Hossain, *Trauma of the Women, Trauma of the Nation: A Feminist Discourse on Izzat*, a paper presented at the Second International Conference on Genocide, Truth and Justice, Jul. 30–31, 2009, unpublished manuscript (on file with authors) (for details on *izzat*/honour as a key factor in post-war Bangladesh).

cases which it may choose to investigate, but also to analyse some of the challenges which would face a criminal justice process in addressing the sexual violence that took place in 1971. We suggest that it is time now for civil society to also re-engage with these recollections, in order to identify the scope and need for the Tribunal to address sexual violence, and also to explore complementary processes, to identify which process would best enable recovery, recording and recognition of the realities of such violence in the lives of women during and after the war.

II CONTEXT

The problem of impunity is deeply embedded in Bangladesh's justice system. In the darkest times, it was grafted onto the Constitution by military rulers through indemnity laws, and continues to permeate and obstruct efforts at seeking accountability. The horrors of massacres, political killings and violent conflicts have smeared the landscape over forty years.

Now, almost forty years on, the International Crimes Tribunal, has finally been established, following the amendment of a statute first enacted in 1973. This development has come in response to decades of unrelenting struggle and demands from civil society, including freedom fighters, survivor groups, and rights organizations, and following an election in which the pledges to hold such trials appears to have contributed significantly to the overwhelming mandate received by the ruling coalition.

During the Bangladesh war, as in various recent South Asian conflicts since – such as in Sri Lanka, Kashmir, Balochistan, the North East of India, or the Chittagong Hill Tracts – rape and other forms of sexual violence have been used systematically to intimidate and terrorise civilians, to deploy notions of destruction of the enemy community's 'honour', which is perceived as embodied in 'their' women's sexual purity, and invocation of shame consequential to the 'defilement' of that 'purity' among, and retaliation against, enemy combatants.⁸

⁸ Askin, *supra* note 2, at 39 (suggesting that sexual assaults and rape crimes are carried out for a multitude of reasons. While rape committed by a soldier on his own might be considered an isolated act and therefore outside the scope of war, and systematic rape officially ordered by a superior may be considered as being within the scope of war, in reality, it will be difficult to distinguish these incidents. She also argues that if it can be established that though there is no official encouragement of rape, there is a pattern of superior officers 'look[ing] the other way', and considering

2.1 *Accounts of Sexual Violence in 1971*

While Bangladesh's official and unofficial histories cover multiple narratives of the violence that occurred in 1971, the majority of these are deeply gendered, and exclude women's lived experiences. As noted in the preface of Ain-O-Salish Kendra's Oral History Project on 1971, women's experiences were given limited space in the construction of the national narrative,⁹ and the accounts of women and girls as survivors and victims of the war largely remained silenced.¹⁰

The Commission of Inquiry presided over by retired Justice Hamood-ur Rahman, and formed in December 1971 by Pakistan's then Prime Minister, Zulfikar Ali Bhutto, submitted its findings to the Pakistani government in July 1972.¹¹ While this Report challenged Bangladesh's claims regarding the numbers of dead and war-affected, including the figure of 200,000 women being sexually assaulted, it clearly admitted widespread killings of civilians, including intellectuals, Bengali officers and soldiers, and indiscriminate killing of Hindus,¹² and the use of rape and sexual violence for revenge, retaliation and torture.¹³ It recommended public trials of

Footnote 8 continued

a single rape as a mere act of personal gratification, this situation could be compared to ordered and systematic rape).

⁹ See Narir Ekattur, *supra* note 5, at 10 (for comments by Hameeda Hossain).

¹⁰ See *VIII Bangladesher Swadhinota Juddho: Dalilpatra* [The Liberation War of Bangladesh: Documents] (H. R. Hasan ed., 1982–1985). We note that it included women's experiences. Also, during the justice advocacy of the Gono-Adalat explained later in the paper, some women's stories were published. However, analysed through the feminist framework, these documents lacked a certain degree of gender sensitivity. And another exception at least for a while, of this is Taramon Bibi who was an ex-combatant in Kurigram, fighting under sector no. 11. She was awarded an honorary title 'Bir Pratik' by the Awami League (Mujib) government in 1973, but there was no trace of her for years. In 1995, Bimal Kanti Dey, a researcher on freedom fighters located her, and she was given her award by the then Prime Minister Khaleda Zia on December 19, 1995 (K.M. Golam Rabbani, *Road named after Taramon Bibi in Kurigram*, NEW AGE, Dec. 19, 2008). She still lives in dire poverty.

¹¹ Hamood-Ur Rahman Commission Supplementary Report to the Commission's Official Inquiry into the 1971 India-Pakistan War, As Released by the Government of Pakistan, 13 (Arc Manor, 2007 (1974)) [hereinafter Supplementary Hamood-ur Rahman Commission Report].

¹² *Id.*, at 35–36.

¹³ *Id.*, at 33 and 44.

several senior officials of the armed forces.¹⁴ Pakistani governments, then and since, have buried the Report and failed to take any action based on its findings.

2.2 *Attempts at Seeking Accountability*¹⁵

In the immediate aftermath of the war, there were high expectations that those responsible for atrocity would be prosecuted. Although the top ranking leaders of the Pakistan Army were not within the jurisdiction of Bangladesh and many of the leaders of the auxiliary forces had also already fled, some 92,000 Pakistani Prisoners of War ('PoWs') were held in India, along with civilians. Following the conflict, India and Pakistan signed the Simla Agreement on 2 July, 1972 which emphasised commitments to pursue regional stability and mutual respect. As a 'gesture of goodwill', India then began the repatriation of the 92,000 PoWs and civilians. Then, a 9 April 1974 tripartite agreement between Bangladesh, India and Pakistan, and an August agreement between Pakistan and India, saw repatriation of all but 195 Pakistani PoWs who were allegedly implicated in atrocities.¹⁶ Thus, while Bangladesh permitted the return to Pakistan of Pakistani nationals alleged to have committed atrocities, it never stated, and *neither did Pakistan*, that the responsibility of any State to try such persons for their crimes was denied or erased. Indeed, Pakistan had itself earlier argued before the International Court of Justice that it had exclusive jurisdiction to try such persons, under Article VI of the Genocide Convention,¹⁷ and it was therefore clear that repatriation was on the understanding, however flawed or naïve, that Pakistan would hold such trials. Even more importantly, the

¹⁴ *Id.*, at 91–95.

¹⁵ See Suzannah Linton, *Completing the Circle: Accountability for the Crimes of the the 1971 Bangladesh War of Liberation*, in this edition of the CRIMINAL LAW FORUM (providing, *inter alia*, a broad overview of the background and efforts at accountability).

¹⁶ See Bangladesh-India-Pakistan Agreement on the Repatriation of Prisoners of War and Civilian Internees, Bangl.-India-Pak., Apr. 9, 1974, 13 I.L.M. 501 (1974), cited in Linton, *supra* note 15 at note 54.

¹⁷ See Trial of Pakistani Prisoners of War (Pakistan v India) (Application Instituting Proceedings) (Application of May 11, 1973), cited in Linton, *supra* note 15 at note 50. See also Convention on the Prevention and Punishment of the Crime of Genocide, art IV, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

Government of Pakistan in a statement in April 1973 categorically stated that it

rejected the right of the authorities in Dacca to try any among the prisoners of war on criminal charges, because 'the alleged criminal acts were committed in a part of Pakistan' by citizens of Pakistan, but Pakistan expressed its readiness 'to constitute a judicial tribunal of such character and composition as will inspire international confidence' to try the persons charged with offenses.¹⁸ This was the context in which Bangladesh then withdrew its demand for trying the Pakistanis in Dhaka (as distinct from withdrawing the demand altogether) in 'faith that Pakistan would hold the trial of the 195 Pakistanis involved in the wartime atrocities'.¹⁹ It was virtually coerced into the decision by Pakistan's refusal, along with a raft of Muslim majority countries, to grant recognition to the new State, as well as Pakistan's refusal to restore Bangladesh's assets or to repatriate Bangladeshi civilians and officers.

These diplomatic changes came hard on the heels of the suspension of the accountability process. The Tribunal's founding statute was enacted in 1973, but there was no opportunity to utilise it. Earlier, the Bangladesh Collaborators (Special Tribunals) Order 1972 was promulgated as Presidential Order No.8 of 1972.²⁰ Although some trials took place under this Act, these were discontinued from 1973, and a general amnesty granted, though this expressly excepted 'those who were punished for or accused of rape, murder, attempt to murder or arson'.²¹

With the political assassinations of 15 August and then of 3 November 1975, the entire process of accountability was to become derailed for several decades, and was to remain so for another three decades. From 1975 onwards, the direct alliances between a succession of military rulers and parties of the religious right, most particularly the Jamaat-e-Islami (several of whose members were alleged to have been involved in atrocities) not only erased the possibility of any State initiative, but also enabled the return to the country and to active politics leaders and members of such political parties. The continuation of military rule, and draconian laws suppressing dissent or political opposition, precluded popular mobilization in support of

¹⁸ S. M. Burke, *The Postwar Diplomacy of the Indo-Pakistani War of 1971*, 13 ASIAN SURVEY 1040 (1973).

¹⁹ Syeed Ahamed, *The Curious Case of the 195 War Criminals*, The D. Star, May 2010, available at <http://www.thedailystar.net/forum/2010/may/curious.htm> (last accessed May 25, 2010).

²⁰ President's Order No. 8 of 1972 (1972) (Bangl.); Collaborators (Special Tribunals) Order (1972) (Bangl.).

²¹ *Id.*

accountability demands. With the return to elected government in 1990, the Jamaat remained in alliance with the ruling party, but the increased space for civil society mobilisation meant that this time a popular movement did get underway focused on renewed calls for 1971 accountability, triggered by the irony of seeing alleged war criminals working closely with the Government, and after 2001 being represented within it. With further elections in 1995, the politics of expediency continued with the Awami League forming a government but failing to take on the issue head – it had entered into an undeclared alliance with the Jamaat to unseat the BNP government. Finally in 2008, given the continuing activism around accountability, which took place despite the Emergency declared under the Caretaker Government, the discourse coalesced around the need to establish a tribunal and to undertake trials.

Most activism around accountability, while it has referenced incidents of sexual violence, or has reflected on documenting women survivors' post war accounts, has not closely explored issues regarding legal accountability, for example relating to evidence gathering, victim and witness protection, trial procedures etc. The Sector Commanders Forum (SCF), more recently, and Ekattorer Ghatok o Dalal Nirmul Committee (Committee for Resisting Killers and Collaborators of Bangladesh Liberation War or Nirmul Committee), since the early 1990s, have been the main driving forces for the call for accountability. Others such as Projonmo 71 (the 'children of the martyrs of 1971'), have also been involved as key actors in these demands. The first two bodies are mainly comprised of former freedom fighters and therefore of men, although the Nirmul Committee was initially formed and led by Jahanara Imam, a woman. We argue that these groups have largely represented the sexual violence of the war through traditional and patriarchal notions of honour and shame.

If the Tribunal is to deal with sexual crimes, then an informed review of the available evidence and an exploration of possible gender-friendly approaches is urgently needed. While the Tribunal does set up a possibility for some form of accountability, the investigation and trial process is a particularly thorny one in cases of sexual violence, and needs to be navigated with care and caution, given the risk of repercussions for the survivors. The Tribunal needs, *inter alia*, to consider what it can actually do, and the role of civil society.

III LESSONS FROM THE PAST – EXPERIENCES OF SURVIVORS OF SEXUAL VIOLENCE IN THE 1971 WAR

To what extent can a national accountability process for the 1971 atrocities ensure justice for victims and survivors of sexual violence? The liberation war was a particularly horrific conflict in terms of the severity of violence targeted at civilians.²² It appears that women and girls were strategically targeted by various forms of violence, in order to intimidate the local population. The strategic use of rape in the Bangladesh war is cited by Brownmiller and others as a particular case study of ‘gendercide’ and rape as a war crime.²³ During the conflict, an estimated 200,000 Bengali women and girls were said to have been raped by Pakistani soldiers, including Punjabi, Pashto and Sindhi²⁴ with an estimated 25,000 allegedly forcefully impregnated.²⁵ Besides intimidation, other rationales for the widespread rape, arguably included attempts to extract information about the ‘insurgency’, to boost the morale of Pakistan Army soldiers and to degrade, humiliate and crush the burgeoning Bangladeshi national identity. In addition, the Pakistan Army’s local auxiliary forces, known as the Razakaar and Al-Badr, are alleged to have used rape to terrorise, in particular the Hindu population, and to gain access to its land and property.²⁶ In this section, we examine the experiences of rape survivors both in the immediate aftermath of the war, and later,

²² George T. Curlin, Lincoln C. Chen & Sayed Babur Hussain, *Demographic Crisis: The Impact of the Bangladesh Civil War (1971) on Births and Deaths in a Rural Area of Bangladesh*, 30 *POPULATION STUD.* 88, 88–89, 93 (1976). See also Ziauddin Ahmed, *The Case of Bangladesh: Bringing to Trial the Perpetrators of the 1971 Genocide*, in *Contemporary Genocides: Causes, Cases, Consequences* 95–115 (Albert Jongman ed., 1996).

²³ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975); Rhonda Copelon, *Gendered war crimes: reconceptualising rape in time of war*, in *Women’s Rights Human Rights: International Feminist Perspectives* 197 (J. Peters & A. Wolper eds., 1994).

²⁴ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 *McGill L.J.* 197 (2000); Rita Manchanda, *Where are the women in South Asian conflicts?*, in *Women, War and Peace in South Asia: Beyond Victimhood to Agency* 30 (Rita Manchanda ed., 2001).

²⁵ See Brownmiller, *supra* note 23, at 84.

²⁶ See Husain Haqqani, *Pakistan: Between Mosque and Military* 79 (2005) (For details on the auxiliary forces).

and the responses by the State and civil society to providing them with redress.

3.1 *Rape Survivors: Recognition, Rehabilitation or Justice*

While the nature and accuracy of statistics pertaining to the numbers of women affected by the wartime violence has remained a source of debate in Bangladesh and Pakistan,²⁷ the fact of crimes of sexual violence committed against women during 1971 are clearly on record. In immediate post-war Bangladesh, the emphasis was on providing support for women survivors. This meant that some ground-breaking services were put in place. However, this emphasis in turn diminished the role of women, particularly war widows in looking after the family, as well as issues pertaining to loss of livelihood, health (including both mental and reproductive health) concerns, displacement, and the overall effects of the breakdown of infrastructure and social networks, all of which were largely sidelined by the State's rehabilitation programs. In many instances, the new regime's rehabilitation programs, framed within the traditional perceptions of shame, honour and purity,²⁸ instead of aiding, further marginalised women survivors.

The first Prime Minister of Bangladesh, Sheikh Mujibur Rahman ('Sheikh Mujib'), introduced the term '*Birangona*' in order to 'acknowledge' the 'sacrifice' of women for the freedom of Bangladesh in 1971.²⁹ This term included those women left behind to take care of their families, particularly the aged and infants, while their men went off to fight the war; those who became freedom fighters and fought alongside the men; those who supported the freedom fighters by providing them with food and medicine; those who took care of the wounded, which often led to their incarceration by the Pakistan Army or the Razakaars (generally also understood as collaborators). Finally, the term also included the women who were raped, either in their own homes or taken to places of detention to be raped repeatedly and forcibly impregnated. The term was intended to give

²⁷ See for details, Supplementary Hamood-ur Rahman Commission Report, *supra* note 11. See also various responses to it by the War Crimes Fact Finding Committee as noted in M. A. Hasan, 71 Massacre in Bangladesh and the Fallacy in the H.R.C Report, in *Documents on Crimes Against Humanity Committed by Pakistan Army and Their Agents in Bangladesh During 1971* 261–264 (The Bangladesh Liberation War Museum ed., 1999–2002).

²⁸ See for details, VIII Bangladesher Swadhinota Juddho: Dalilpatra, *supra*, note 10.

²⁹ D'Costa, *supra* note 6, at 121.

these women an honorary status, and also to qualify them, similarly to male freedom fighters, for preferential educational and employment opportunities in the public sector.³⁰ However, the continuing stigma resulting from rape, despite attempts to recast the acts as a blow to furthering national honour (through sacrifice), rather than loss of family or community honour, meant that rape survivors either refused to or were discouraged by others from being labelled as *Birangona*. As a result, they were excluded from State rehabilitation programs. This ‘branding’ also isolated women’s experiences as rape survivors from the mainstream narratives of the ‘heroic’ tales of the war.³¹

In 1972, the Bangladesh Government established the Women’s Rehabilitation Organisation to institutionalise women’s rehabilitation projects, with the National Central Women’s Rehabilitation Board coordinating the Government’s post-war policies. From interviews, scattered reports and contemporaneous documents, the Women’s Rehabilitation Organisation appears to have had three-fold objectives, and involved programmes for primary ‘rescue and rehabilitation’, income-generation, and rehabilitation of children.³² The first involved ‘rehabilitation’ by way of medical assistance, and also by ‘freeing’ women from the ‘un-chosen curse’ of motherhood, ‘encouragement’ to men to marry *Birangonas* through incentives and opportunities, and creating social awareness so that *Birangona*’s families would take them back. The income generation programmes included helping the women become self-sufficient through training programmes, such as sewing and garments, or jute and tapestry production; spice grinding, and separate economic assistance to widows to enable them to use their entrepreneurial skills. Finally, the

³⁰ Faustina Pereira, *The Fractured Scales: The Search for a Uniform Personal Code* 6 (2002).

³¹ Bina D’Costa, Marginalized Identity: New Frontiers of Research for IR?, in *Feminist Methodologies for International Relations* 129 (Brooke A. Ackerly, Jacqui True & Maria Stern eds., 2006). See also Nayanika Mookherjee, ‘Remembering to Forget’: Public Secrecy and Memory of Sexual Violence in the Bangladesh War of 1971, 12 J. ROYAL ANTH. INST. 433–50 (2006).

³² D’Costa, *supra* note 6, Ch. 4. The treatment of women survivors of sexual violence in the immediate aftermath of the war have also won retrospective plaudits – particularly with regard to the immediacy of efforts to ensure medical emotional and financial support, and to locate employment or other livelihood opportunities, as well as to acknowledge and witness their experiences (Email from Marianne Scholte, Trauma Therapist (Apr. 28, 2010) (On file with the authors)). Marianne Scholte has been working with rape survivors primarily in Kosovo for years.

programmes for rehabilitation of children envisaged organising international adoption of unwanted babies; constructing orphanages for orphaned children and renovating and developing the government and non-government orphanages already operating; as well as a proposal to establish a home for abandoned children; and a day-care centre to look after the children while the mothers worked.

With the benefit of hindsight, there have been concerns expressed about these approaches. They may have reinforced the isolation of the survivors, rather than reintegrating them in society by enabling them to demand redressal of the wrongs they had undergone.³³ However, others do see interventions were ahead of their time, providing women with much needed support and solidarity and critical material assistance which helped them rebuild their lives.³⁴

This approach reflected and was reinforced by prevailing social and cultural norms, which ensured that women remained largely silent in the post-war justice discourse about their individual trauma in the name of maintaining the 'honour' not only of their own families, but also of the nation. Very few women, then or since, have come forward to tell such stories. Two noteworthy examples are Ferdousi Priyobhashini³⁵ and Haleema Parveen³⁶ who articulated their experiences of sexual violence during the war to advocate for gender justice. Priyobhashini has shared her traumatic experiences over the last decade in various national and international public platforms, including in events occurring on the occasion of the Tokyo Tribunal, to advocate for gender justice for all *Birangona*, including herself.

For brevity, we focus in the next section on one of the rehabilitation programmes, alluded to above, and which dealt with what Askin has called 'reproductive crime'.³⁷ This will also enable us to

³³ Narir Ekattur, *supra* note 5, at 35–107 (for various accounts of *Birangona*), 123–133, 249–260 (for accounts on war affected women in general).

³⁴ Marianne Scholte, *Will the War Crimes Tribunal Bring Justice to Bangladeshi Women?* (2010) FORUM (forthcoming). Email from Marianne Scholte, Trauma Therapist (Apr. 28, 2010) (On file with the authors).

³⁵ Shaheen Akhter, *Ferdousi Priyobhashini: Ekok Nari* [Ferdousi Priyobhashini: A Solitary Woman], in Narir Ekattur, *supra* note 5, at 57–79.

³⁶ Interview taken by D'Costa on 25 December, 2004 (unpublished, on file with author).

³⁷ Askin, *supra* note 2, 398 (introducing the idea that an act may constitute a 'reproductive crime', if it affects reproductive capacity in some way. Generally this will include becoming pregnant or losing the ability to reproduce. While anecdotes and analysis exist of women not being able to conceive after the war, it is not known

illustrate some of the particular challenges for proceeding with sexual violence cases under the International Crimes (Tribunals) Act 1973 as amended in 2009.

3.2 'Reproductive Crime': Rape, Forced Impregnation and Forced Maternity

As stated earlier, various documents suggest that there were at least 25,000 cases of forced pregnancy in the aftermath of the war. Women were targeted because of their reproductive capabilities, and to forcibly impregnate them with different genes, to change the ethnic make-up of their children.³⁸ Evidence suggests that members of the Pakistani armed forces and certain para-military groups boasted of 'impregnating Bengali women' and making 'pure Muslims' out of Bengalis.³⁹ Repeated (both gang, and repeated by one person) rape had allegedly been used to force pregnancy on women.⁴⁰ Also, soldiers were reportedly said to have repeated made specific statements of intent to women that pregnancy was the desired outcome of a rape.⁴¹ It is alleged that pregnant women were also held in captivity following such rapes so that they could carry babies to a full term.

The only mention of sexual violence in the International Crimes (Tribunals) Act of 1973 (unamended in the 2009 update) is to 'rape', and that appears just once, as a core crime within the wider crime against humanity.⁴² The Act does not provide a definition of 'rape'. Creative prosecutorial approaches and judicial intellectual open-ness will be necessary if the Tribunal's work is to capture some of the

Footnote 37 continued

how many women had lost their reproductive abilities due to rape during the war. See Curlin et al, *supra* note 22, at 93.

³⁸ See for details, Anne Tierney Goldstein, *Recognizing Forced Impregnation as a War Crime under International Law: A Special Report of the International Program* (Centre for Reproductive Law and Policy, 1993).

³⁹ Salma Sobhan, National identity, fundamentalism and the women's movement in Bangladesh, in *Gender and National Identity: Women and Politics in Muslim Societies* 63 (V.M. Moghadam ed., 1994).

⁴⁰ Brownmiller, *supra* note 23, at 82.

⁴¹ See D'Costa, *supra* note 6, at 192–201 (for the interviews with Dr Davis, Missionaries of Charity Sisters and other social workers, 1999–2002, taken by D'Costa). See also, Sobhan, *supra* note 39, at 63–64 and Nayanika Mookherjee, *Available motherhood: Legal technologies, 'state of exception' and the dekinning of 'war babies' in Bangladesh*, 14 *CHILDHOOD* 339–354 (2007).

⁴² See Linton, *supra* note 15 (for a close analysis of the legislation).

totality of the experience of women in the 1971 war. For example, with the requisite evidence, sexual violence including rape, forced impregnation and forced maternity could be argued to constitute not only war crimes or crimes against humanity but also genocide (in this regard, if 'reproductive crime' was committed with the requisite intent to destroy a particular group as such, including the individual as a member of the group, then this may fall within the scope of the Genocide Convention).⁴³

In post-war Bangladesh, it appears that there was a tendency to conceal, rather than accurately document, the evidence in cases concerning sexual violence. Social workers and medical practitioners were primarily responsible for dealing with raped women. In addition to the Women's Rehabilitation Organisation, international organisations and institutions – such as the International Planned Parenthood Foundation ('IPPF'), the International Committee of the Red Cross ('ICRC') and the Catholic Church – became involved in rehabilitation programs.⁴⁴ These organisations also carried out the daunting task of dealing with ongoing pregnancies. Two activities thus began to take place simultaneously: the program that allowed pregnant women to have abortions, and the adoption of the so-called 'war babies'.⁴⁵ While IPPF and the ICRC focussed on abortion and adoption of the so-called 'war babies', the Catholic Church, through the Missionaries of Charity in Kolkata, exclusively focussed on the adoption of babies. In an exceptional and far-reaching reform, under the Bangladesh Abandoned Children (Special Provision) Order of 1972,⁴⁶ adoption of 'abandoned' children became legal, irrespective of religion. Several international agencies arranged adoption abroad of the 'war babies'. The US branch of the Geneva-based International Social Service was the first international adoption agency to

⁴³ See for details, Askin, *supra* note 2, at 340–341. The definition of genocide is still very narrow. See for example, Patricia M. Wald, *Genocide and Crimes against Humanity*, 6 WASHINGTON U. GLOBAL STUDIES L. R. 621, 621 (2007) (in which the author, who was a judge of the ICTY between 1999 and 2001, argues that the dividing line between genocide and crimes against humanity is very fine).

⁴⁴ D'Costa, *supra* note 6, at 133–138.

⁴⁵ 'War babies' is the term used in Bangladesh to describe children who are born during or after a conflict as a result of planned and systematic rape of women by foreign or 'enemy' men. Due to the nature of their conception, war babies experience stigma and prejudice. See Mookherjee, *supra* note 41 (for a discussion in relation to the Bangladesh case).

⁴⁶ The Abandoned Children (Special Provision) Order of 1972, P.O. No. 124 of 1973 (1973) (Bangl.).

work in post-war Bangladesh. Through the Missionaries of Charity, other institutions also became involved in the program, including Families for Children and the Kuan-Yin Foundation (both in Canada), the Holt Adoption Program (United States) and Terre des Hommes (Switzerland).⁴⁷

Confusion over how to deal with the results of forced maternity, as opposed to the women themselves, appears to have reigned even at the very highest levels of government. Nilima Ibrahim, a prominent social worker and feminist author, recalls her meeting with Sheikh Mujibur, in her book *Ami Birangona Bolchi*. When questioned about the status of the 'war babies', the Prime Minister had apparently commented, 'Please send away the children who do not have their father's identity. They should be raised as human beings with honour...' ⁴⁸ Perhaps such statements aided the push for international adoption.

In addition to adoptions through State-sponsored programs, international organisations such as the IPPF and the International Abortion Research and Training Centre, as well as local clinics, helped women to carry out abortions.⁴⁹ Such clinics were set up with the support of the Bangladesh Central Organisation for Women's Rehabilitation in Dhaka and 17 outlying areas, in order to cope with unwanted pregnancies.

The Tribunal if it chooses to examine the issue of forced impregnation and forced maternity, and possibly also forced abortion, could do so through the testimonies both of women survivors, and the 'war babies'⁵⁰ who were adopted by other families. It could begin its investigations through interviews with those who received or provided services from the organisations discussed above. These investigations could go some way to demonstrating how acts of sexual violence perpetrated during 1971 were indeed used to control, manipulate and seek to eliminate the religious, racial, linguistic and

⁴⁷ Bina D'Costa, *Victory's Silence*, 21 *HIM. SOU. ASIAN*, 56–59 (2008).

⁴⁸ Nilima Ibrahim's interview with Ain-O-Salish Kendra, 1997 (Unpublished, undated, on file with authors); Nilima Ibrahim's interview with D'Costa, October, 1999 (Unpublished, on file with author).

⁴⁹ D'Costa, *supra* note 47, at 58.

⁵⁰ Due to the circumstances of their conception, 'war babies' in Bangladesh experienced significant stigma and prejudice, and the continuing silence around their existence (ruptured exceptionally in events such as that at the Liberation War Museum some years ago, arranging for a public speech by a former 'war baby' now settled in Canada) means that it is unsurprising that they have now rarely, if ever, represented in various national celebrations of Bangladesh.

ethnic identities of a group, i.e. the Bengalis. On the other hand, the Tribunal must also, in developing its work on these lines, take into consideration issues such as not forcing disclosure of identities of survivors without their consent and the unintended consequences which could result from the disruption of now settled lives through giving testimony so many years after the event.

3.3 *Witnesses and Victims: Fears of Insecurity, Disruption and Retaliation*

The silence over the issue of justice for atrocity, and in particular on sexual violence, was ruptured with the holding of the 'Gono-Adalat' or the 'Peoples' Tribunal for Trial of War Criminals and Collaborators' which was held in Dhaka in 1992. While there is little independent documentation of the impact or consequences, anecdotal evidence available to the authors suggests that the People's Tribunal served to coalesce long silenced demands for justice for the crimes committed in 1971.

The 'National Coordinating Committee for Realisation of Bangladesh Liberation War Ideals and Trial of Bangladesh War Criminals of 1971' united a civil society-led movement. It was spearheaded by Jahanara Imam, known as Shoheed Jononi (Mother of a Martyr) as a mark of respect. The People's Tribunal in Dhaka drew some 200,000 participants from all over the country.⁵¹ The hearing was held in the centre of the capital city, at a location of considerable significance where the Pakistani Army had surrendered in 1971, and where one of the first calls of independence had been made by Sheikh Mujib. The People's Tribunal, which comprised several retired justices, heard 'the framing of charges' against Golam Azam, then the Amir or leader of the Jamaat-e-Islami, for his alleged involvement in atrocities. Witnesses came forward to give their testimony before the gathered crowds. They included four women, from a remote area in Jessore District, who spoke in public about their experiences of rape and sexual violence.

The event garnered massive public support. In retrospect, it was a clear landmark in the movement for justice relating to 1971. Involvement in the movement which culminated in the Gono-Adalat, and participation in its processes, met with retaliatory measures from

⁵¹ See for details, Partha S. Ghosh, *Bangladesh at the crossroads: religion and politics*, 33 *ASIAN SURVEY* 697–710 (1993). See also Ahmed Ziauddin, *supra* note 22, at 94–115.

the Government of the day. It initiated criminal cases for sedition against key persons, including well known freedom fighters and the children of intellectuals killed in the war. Ironically, those seeking to break the pattern of impunity and to demand justice for the 1971 atrocities, instead found themselves caught up in the coils of the criminal justice system themselves, having to surrender before the High Court, seek bail and then fight to prove their innocence of these vexatious and abusive claims.

Certainly, no one involved in the Gono-Adalat could have anticipated the magnitude of the State's response. They could perhaps have speculated on the potential impact on the four women rape survivors who gave testimony. Unlike the other witnesses, the women who testified were socially and economically vulnerable.⁵² Due to a sudden government-sponsored attack on the tribunal, it was not possible to document the women's testimonies; nonetheless, photos of them appeared in newspapers the following day.⁵³ Following this disclosure of their identities and histories, the four women found themselves virtually ostracised in their communities, and in some cases rejected by their husbands – and therefore rendering them particularly disinterested in speaking again about their experiences with 'outsiders'.⁵⁴ It is difficult to assess how this very negative experience of women coming forward with testimony about sexual violence can or will impact on potential witnesses before the present International Crimes Tribunal.

This experience took place against a backdrop of growing international awareness on issues of impunity and accountability, and the establishment of new justice mechanisms such as the international tribunals. It raised new public debates in Bangladesh about the need for a comprehensive justice agenda to address international crimes. The authors take the view that the People's Tribunal demonstrated that memories of 1971 have the power to compel new demands for justice and accountability, despite the long lapse of time since the events. On the other hand, some survivors of the 1971 sexual violence also experienced their own personal narratives being taken over by a broad based social movement, without any comprehension of the

⁵² Suraya Begum, Masuda, Elijan, Duljan, Momena: kushtiar charjon grihobodhu, [Masuda, Elijan, Duljan, Momena: Four Housewives from Kushtia] in Narir Ekattur, *supra* note 5, at 82.

⁵³ Shahriar Kabir, Gonoadaloter Potobhumi [The Narrative of the Peoples' Tribunal] (1993).

⁵⁴ Begum, *supra* note 52, at 82–83.

impact of violence on their lives, and the failure to provide them with any concrete legal, financial or moral support.

IV LEARNING FROM THE PAST – TWO DECADES OF JURISPRUDENCE ADDRESSING SEXUAL VIOLENCE IN INTERNATIONAL COURTS AND TRIBUNALS

In the two decades since the early 1990s, several special international tribunals have been established – as international or ‘hybrid’ bodies – to try individuals accused of responsibility for international crimes. The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’)⁵⁵ were ground breaking in securing the very first convictions for sexual violence as war crimes, crimes against humanity or acts of genocide.⁵⁶ The abuse of women’s reproductive capability to manipulate and affect reproductive outcomes and alter ethnicity can amount to criminal conduct under international law. The control, manipulation and elimination of reproductive abilities of a specific group, within the Genocide Convention, may in certain circumstances, even constitute genocide.⁵⁷

⁵⁵ The ICTY was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993. The ICTR was established by the UN Security Council Resolution 955 on November 8, 1994. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827; U.N. SCOR., 48th Sess., 3217th mtg.; U.N. Doc. S/Res/827 (May 25, 1993); 32 I.L.M. 1203 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955; U.N. SCOR 49th Sess., 3217th mtg., U.N. Doc. S/Res/955 (Nov. 8, 1994); 33 I.L.M. 1598 [hereinafter ICTR Statute].

⁵⁶ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, (Sep. 2, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, (Dec. 10, 1998) [hereinafter *Akayesu* Trial Chamber Judgement]; Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment (July 21, 2000); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (July 15, 1999); Prosecutor v. Kvočka, Case No. IT-98-30/7-T, Judgment (Nov. 2, 2001); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment 437–438 (Feb. 22, 2001). The Prosecutor v. Zejnil Delalić et. al., Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 229, 241, 383–393 [hereinafter *Čelebići Appeals Chamber Judgement*]. See also, Jennifer Park, *Sexual Violence as a Weapon of War in International Humanitarian Law*, 3 INTL. PUB. POL. REV. 14–16 (2007).

⁵⁷ See Genocide Convention, *supra* note 17, art II; ICTY Statute, *supra* note 55, art 4. The ICTR in *Akayesu* has held that measures under Article II(d) may be interpreted to include ‘asexual mutilation, the practice of sterilization, forced birth

The International Criminal Court ('ICC') currently has the most sophisticated regime – legally and procedurally – enabling the prosecution of crimes of sexual violence in the international arena.⁵⁸ Article 68(1) of the ICC Statute provides extensive powers to the chambers in relation to witness protection, and Rules 71, 72 and 73 of the Rules of Procedure and Evidence⁵⁹ specifically address issues arising in relation to victims of sexual violence. Article 29 of the ICC Code of Professional Conduct for Counsel addresses itself to how they are to behave with victims.⁶⁰ Insofar victim reparation is concerned, Article 75 of the ICC Statute has opened the way for extensive possibilities for that purpose.

Some of the experiences of women appearing as witnesses have been far from ideal, as in the case in the ICTR.⁶¹ However, in other tribunals, significant advances in jurisprudence and in practice have

Footnote 57 continued

control, separation of the sexes and prohibition of marriages'. It further noted that in patriarchal societies, the rape of women in war, and forced pregnancy, and other mental pressures to stop birth, could be understood as the enemy's attempt to impose their ethnic identity on any new children. *See Akayesu* Trial Chamber Judgement, *supra* note 56. Similarly, in 1996, in reviewing the indictments against Radovan Karadžić, the Bosnian Serb political leader and Ratko Mladić, the leader of the Bosnian Serb army, the ICTY invited the prosecution to broaden the scope of genocide in suggesting that the 'systematic rape of women in some cases is intended to transmit a new ethnic identity to the child' (*See Prosecutor v. Karadžić & Mladić, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 & IT-95-18-R61, paras. 94–95*).

⁵⁸ Rome Statute of the International Criminal Court, art 68, Sept. 16, 1999, 2187 U.N.T.S. 90, adopted Jul. 17, 1998, entered into force Jul. 1, 2002) [hereinafter ICC Statute].

⁵⁹ Rules of Procedure and Evidence of the International Criminal Court, PCNICC/2000/1/Add. 1, arts 71–73, adopted Sept. 3–10, 2002; entered into force upon adoption.

⁶⁰ Code of Professional Conduct for Counsel, ICC-ASP/4/Res. 1, art 29, adopted Dec. 2, 2005, entered into force Jan. 1, 2006.

⁶¹ For example, in the Butare trial at the ICTR, on 31 October, 2001, the judges (William Sekule of Tanzania, Winston Maqutu of Lesotho and Arlette Ramaroson of Madagascar) laughed at the witness who was a victim of multiple rapes. The judges neither apologised nor were reprimanded afterwards. Also, when the victim was cross-examined by the defense counsel Duncan Mwanyumba, she was asked offensive and insensitive questions such as 'Did you touch the accused's penis?: Were you injured in the process of being raped by nine men?'. *See Binaifer Nowrojee, "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?* (Policy Report on Gender and Development: 10 Years after Beijing Paper No. 10, U.N. Inst. For Social Dev., Nov. 15, 2005).

been made. Mainly due to strong political will, the Special Court for Sierra Leone ('SCSL') has been successful in adopting a prosecution strategy that addressed crimes of sexual violence from the outset.⁶² Further it specifically tasked a trial attorney to prosecute sex crimes, and assigned three experienced women out of ten to investigate crimes of sexual violence.⁶³ It also established gender sensitive methods/procedures for taking evidence and established a witness protection mechanism.⁶⁴

Feminist critics of international politics and international law have long argued that the prosecution of sex crimes⁶⁵ and gender-based crimes⁶⁶ in conflicts have been less than sensitive to women's lived experiences.⁶⁷ Also, they have suggested that better prosecution strategies in international trials may not solve the concerns women

⁶² Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 89 (2005).

⁶³ Daniel Terris, Cesare P. R. Romano, & Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, 19 (2007).

⁶⁴ Truth and Reconciliation Commission, Sierra Leone, IIIB Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission 88–90 (2004) [hereinafter *Witness to Truth*].

⁶⁵ Throughout this article, we use terms such as 'sex crimes', 'sexual violence' and 'sexual assault' interchangeably. These terms variously encompass rape, enforced prostitution, enforced impregnation, enforced maternity, sexual mutilation and genocidal rape. See Askin, *supra* note 2, at 11–12.

⁶⁶ It is important to note that gender-based crimes may be committed against men as well as women. While sexual violence against men and boys is generally understood as encompassing rape and sexual assault, the ICTR has noted that it 'is not limited to physical invasion of the human body and may include acts that do not involve penetration or even physical contact'. If a victim's sexual or reproductive health or identity is affected, for example by various kinds of sexual humiliation such as castration and other forms of enforced sterilization; other forms of sexual mutilation; genital violence (for example beatings of the genitals or the administration of electric shocks to the genital area, which occurred during the Bangladesh war) these could also form the basis of gender-based crimes. See for details, United Nations Office for the Coordination of Humanitarian Affairs Research Meeting, *Use of Sexual Violence in Armed Conflict: Identifying gaps in Research to Inform More Effective Interventions*, Jun. 26, 2008, available at <http://www.ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId> (last accessed Mar. 30, 2010).

⁶⁷ Karen Engle, *'Calling in the Troops': The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189 (2007); Julie Mertus, *Shouting from the Bottom of the Well: The Importance of International Trials for Wartime Rape of Women's Agency*, 6 INT'L FEM. J. POL. 110 (2004).

have,⁶⁸ such as women's protection as witnesses in the aftermath of trials. Reports from recent country-specific transitional justice processes draw attention to the necessities of women-friendly tribunals and enquiry commissions with women staff; training for statement-takers and report writers on issues of rape and sexual violence and providing necessary logistic support, such as transport, accommodation, medical assistance, for witnesses.⁶⁹

Alongside the jurisprudential and procedural developments achieved in international and hybrid criminal tribunals, the international activism and transnational networking of women's rights advocates' have been successful in establishing two important international women's tribunals to highlight women's experiences of sexual violence in war and further demands for justice. Despite the fact that they were entirely informal or non-governmental in nature, their importance cannot be wiped away. The Global Tribunal on Violations of Women's Human Rights established in 1993 ('Vienna Tribunal') and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery in 2000 ('Tokyo Women's Tribunal')⁷⁰ both demonstrated that war-time sexual violence is pervasive and women are specifically targeted because of their gender. These tribunals also documented the failure to meet the concerns of women survivors, whether by the State or by other human rights institutions or agencies. While these informal tribunals aimed to, and to a degree succeeded in documenting and bringing to light gross violations of women's human rights in war, they also in themselves provided an opportunity for recognition and respect for the women concerned, itself perhaps a part of the process of reparations. They were established precisely due to the absence of effective formal courts to take up these particular cases, and served a purpose beyond that which could have been achieved in the courts.

⁶⁸ *Id.*

⁶⁹ See Witness to Truth, *supra* note 64, at 85–95 and Harris-Rimmer, *supra* note 3, at Ch. 1.

⁷⁰ Firdausi participated in this Tokyo Tribunal and shared her experience, even though she was not a victim of Japanese war atrocities during World War II.

V HOPES FOR THE FUTURE – RECOGNITION OR REDRESS FOR SEXUAL VIOLENCE IN THE BANGLADESH WAR

Despite developing legal principles and increasing advocacy for accountability for gross violations of human rights, including war crimes and crimes against humanity, there is growing realisation that in practice, only a very limited number of perpetrators could be held accountable by judicial bodies. This has led to the consideration of complementary processes as a potentially more pragmatic response to meeting the demands for justice. Weak democratic States, such as Bangladesh, experience serious political obstacles in implementing truth and reconciliation or justice seeking programmes. The long running impunity in Bangladesh evidences the pressures that arise when ruling elites fear the reaction of various interest groups, especially of now-powerful religious and political leaders who are suspected for their role in serious criminality from the past, and are inhibited from initiating the process of justice as a result. In addition, the task of bringing all the perpetrators to justice and providing redress to all those who have been victimised during conflict, and at a distance of over four decades, is clearly not one which can be achieved in totality; and in order to be achieved even in part, must involve a process of prioritisation and sequencing and a hard look at available resources and capacity.

The Bangladesh government, after some delay, has now appointed judges, located the Tribunal in the old High Court Building, named key prosecutors, and investigators, and has taken some steps, the legality of which has already been challenged, to bar alleged war criminals from leaving the jurisdiction.⁷¹ However, it has not yet begun any process of public information or discussion regarding the nature of the proposed proceedings, or identified how the Tribunal would be resourced. Despite welcome reiterations that international standards and best practices in the area of international justice will be applied, it is unclear as yet how this will occur and whether the Tribunal and its staff will be given the necessary resources and opportunities to acquire technical expertise in this regard in order to equip themselves for the rigours of the process before them.

⁷¹ Sahil Nagpal, Bangladesh bars war crimes suspects from travelling abroad (Mar. 22, 2009), available at <http://www.topnews.in/bangladesh-bars-war-crimes-suspects-travelling-abroad-2142805> (last accessed May 25, 2010).

To-date, there has been little discussion either in official or civil society forums regarding whether or how the planned proceedings under the International Crimes (Tribunals) Act 1973 as Amended would address this complex issue of gender violence. Nor does there appear to have been any consideration of the likely trauma and mental suffering that is almost certain to be stirred up by the process, and how to prepare for that.

5.1 *What the Tribunal Can Do*

The Tribunal, in designing its own approach to crimes of sexual violence in the Bangladesh war of liberation, should analyse global experiences over the past two decades, as well as domestic experiences of dealing with rape, trafficking and other sexual assaults.

While there have been mixed results globally, there has been some success, at least in ensuring that charges are framed regarding crimes of sexual violence. This has been achieved through prosecutorial will leading to early adoption of a prosecution strategy to pursue sexual violence. From this have flowed timely training for all staff; engaging dedicated, competent and specialised investigators and prosecutors; ensuring care for women victims' safety and dignity, through information and communication to victims, preparing witnesses adequately and providing support and protection; and ensuring there is an enabling court room environment. Domestically, there have been significant cases where a concerted and coordinated effort by prosecutors and investigators together with civil society support, has resulted in effective prosecutions of gender crimes.⁷² The Tribunal

⁷² Among the celebrated Bangladeshi cases are the following examples. In 1994, 9 persons were convicted of abetting suicide, following their involvement in carrying out an extra-judicial sentence of pelting with stones of a woman called Nurjehan further to a traditional dispute resolution process in Chattokchara, Sylhet – see Meghna Guhathakurta Dossier 25: Women, Politics and Religion: The Scenario in Bangladesh” in *Women Living Under Muslim Laws*, available at <http://www.wluml.org/node/461> (last accessed 1 June 2010). In 1997, three police officers were convicted of the rape and murder of Yasmin, a domestic worker, in Dinajpur, Bangladesh – see *Moinul Haque (Md) and another v. State* (2004) 56 D.L.R. 8 (Bangl., S. Ct. Appellate Div.); HUMAN RIGHTS IN BANGLADESH (Hameeda Hossain ed., 1998); Ain o Salish Kendra, Dhaka, available at www.ask.bd.org (last accessed 1 June 2010; Tahmina Shafique, *Yasmin's Legacy*, NEW AGE XTRA, Oct. 2008, 23–27, available at http://www.newagebd.com/2008/oct/17/oct17/xtra_inner3.html (last accessed 1 June 2010); *Rajib Kamrul Hasan v. The State*, (2001) 21 B.L.D. 46 (Bangl., S. Ct. Appellate Div.). In 1999, several men were convicted of the gang rape and then enforced nude photography of Smritikona Biswas in Barisal – see *Al-Amin v. State* (1999) 51 D.L.R.

may draw on these experiences in considering how to address support for victims inside and outside the courtroom, providing them with adequate information, and ensuring that sensitive and respectful attitudes are shown to those who testify before it, preventing repetitive or overly aggressive questioning by defense counsel as appropriate, and protection before during and after the trial.

The Tribunal may incorporate these approaches in its Rules of Procedure, or integrate them in their own practice as it unfolds. Interestingly, although the Code of Criminal Procedure⁷³ is expressly excluded, the Penal Code⁷⁴ (which contains several offences relating to sexual violence) as well as the Suppression of Violence against Women and Children Act⁷⁵ and the rules framed thereunder are not – the Tribunal may therefore choose to draw upon related jurisprudence.

In developing a prosecution strategy, the Tribunal will also need to grapple with questions of how to bring rape charges, whether as crimes against humanity or genocide or war crimes, and whether to include only rape, or other forms of sexual violence, such as forced pregnancy and sexual slavery. In the most important early stage, the Tribunal will need to equip its investigators with skills on how to gather evidence and conduct interviews in such cases, and to ensure they are aware of developments in international case law and approaches, and the different nature of evidence gathering for sexual violence in the context of international crimes as distinct from the usual domestic cases with which they are familiar.

5.2 *What Civil Society Can Do*

In Bangladesh, either in collaborative or adversarial relation to national governments, civil society groups play a vital role in diffusing understanding of and efforts to realise access to justice and redress for rights violations. While the proposed trials would be held in a domestic tribunal, with State appointed judges and prosecutors, civil society could play a role in assisting the Bangladesh Tribunal by providing it

Footnote 72 continued

154 (Bangl., High Ct.); Hana Shams Ahmed, *Smriti's Fight Goes On*, 7 DAILY STAR WEEKEND MAGAZINE, Jul. 11, 2008.

⁷³ Code of Criminal Procedure 1989, Act V of 1898 (Bangl.).

⁷⁴ Penal Code 1860, Act XLV of 1860 (Bangl.).

⁷⁵ The Suppression of Violence Against Women and Children (Amendment) Act, 2003 (Bangl.).

with necessary technical assistance on the processes and approaches used in other international and hybrid courts and tribunals.

We believe that the Tribunal offers an opportunity to create some form of accountability for sexual violence. It will therefore be critical to grapple with questions of method and practice early on in its functioning. Instead of being intimidated by the resource constraints, we would suggest also learning from the Sierra Leone example⁷⁶ and enabling prosecutors and investigators to speak to people across the country to inform them of their work.

Civil society organisations, particularly women's organisations which have played a major role in supporting survivors of gender violence (in cases of rape, acid attacks, trafficking and domestic violence), and others who have worked on documenting narratives of gender violence from 1971, could play this initial outreach role to inform victims and witnesses frankly of what their speaking to the Tribunal process may involve, including both the possibilities and the risks, in particular of disclosure or stigmatisation. Such groups could also play an important role in providing support and protection services, either directly if the Tribunal permits this, or through training for Tribunal staff, ensuring access to counseling services which may be much needed for women who choose to finally speak out after years of silence and anonymity, and also clearly preparing

⁷⁶ See for details, Nowrojee, *supra* note 62 at 99–102. Nowrojee details how Prosecutor David Crane, despite limited resources effectively addressed sexual crimes through gender-sensitive prosecutorial strategies, which incorporated sexual violence crimes at the outset and were followed through consistently. His team consisted of two experienced female investigators ensuring an enabling environment for the victims to recount their stories. Also note, Nowrojee's comments on Crane's outreach program. She states that

[i]n Sierra Leone, when the Special Court talks about outreach and information, they don't mean a big building, or U.N. documents in English and French. In Sierra Leone, outreach is the prosecutor and a Krio interpreter travelling to remote out-laying areas where they address the population in the local language and explain in simple comprehensible language what the court is doing. Prosecutor David Crane has visited and addressed people in every province in the country. At all of those meetings, he talks about how his mandate is to provide justice to his client, the Sierra Leonean people. What David Crane shows is that political will by the prosecutor and a dedicated, effective, competent staff can make all the difference, even working under constrained conditions

Cited in Binaifer Nowrojee, We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence, <http://www.ictt.org/ENGLISH/colloquium04/nowrojee.htm> (last accessed May 23, 2010).

them for giving detailed descriptions in public of long ago, painful and humiliating experiences and also understanding the risks – that is that their names will be known to the accused, and despite best efforts to keep their names otherwise confidential there is a high risk of disclosure. For many women, this may be the make or break issue regarding their decision to testify. They may decide that speaking out is not worth the risk of disrupting their personal lives (some may never have disclosed their history of sexual violence).

The most serious and intractable issue will likely relate to security and protection from reprisals for witnesses. Despite persistent demands for laws on this issue, the reality in Bangladesh is that women survivors are all too often inhibited from coming forward or from pursuing claims for justice precisely given the threat of further violent repercussions against them and their families by powerful accused perpetrators. While to some degree, women's rights activism and survivors have broken the silence on sexual assaults, and have been able to tackle the routine stigmatization of victims, along with public and prolonged scrutiny of their own character and sexual histories, we need to think long and hard to consider what, if anything, can be done to ensure that these risks are mitigated or removed for those who come before the Tribunal. Having said that, the passage of time since 1971 may open previously closed doors. Since all surviving victims are much older, they may have been long married and likely to have adult children. Thus, the disincentive for such women to come forward, in such cases, may not be as strong as the incentive.

Finally, it would be important to start engaging in a dialogue with the Tribunal on the need for it to shape its work to enable accommodation of cases of women survivors of sexual violence.

5.3 *Beyond the Tribunal?*

A growing body of international literature examines various aspects of the need to come to terms with the past in order to create a peaceful political and social future.⁷⁷ Scholars and practitioners generally agree that it is necessary to examine, acknowledge, and account for violence that occurred in past in order to ensure the healing of nations.⁷⁸ In Bangladesh, while there is a large groundswell

⁷⁷ For relevant scholarship, see generally, Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000); Robert I. Rotberg & Dennis Thompson (eds), *Truth v. justice : the morality of truth commissions* (2000).

⁷⁸ For an overview, see Helen Scanlon, *Militarization, Gender and Transitional Justice in Africa*, 10 FEM. AFRICA 31 (2008).

of opinion in favour of accountability, there is less clarity on how to deal with the past, what should be done, how it should be done, what needs to be 'fixed', whether and what kind of social repair is necessary, whether healing is possible, and above all, what works and what does not work in ensuring justice and sustainable peace. While many have been vocal in calling for trials, and have welcomed the establishment of the Tribunal, many also remain concerned about how the Tribunal will function in practice, and most critically about whether adequate and timely measures are being adopted to ensure that it has sufficient resources and technical capacity to take on the enormous task that lies ahead.

Related to this, it must be asked, what would happen following this trial? How will Bangladesh as a society move forward? How will the witnesses, especially women return to their everyday lives? Now that a decision has been taken to proceed with trials, there is need to consider what to do about the wider issues that a court of law cannot deal with or which may surface in the course of investigations. These include issues regarding how to address the complexity of the violence of 1971, in particular incidents involving assaults on minority ethnic communities.

Bangladesh has never fully sought to incorporate or address women's concerns in its long journey towards justice for the crimes of 1971. We can however anticipate that the forthcoming trials may do so, despite the lack of such debates even within the movement for accountability. While this is an enormous challenge, this moment in history also presents a window of opportunity to engage in social repair. If there were to be some kind of wider commission of inquiry in Bangladesh, it would have to be innovative and tailored to the circumstances of the nation. Any such commission should provide opportunities for Bangladeshis to come to terms with a more plural and complex understanding of their pasts. To take gender justice further than a court of law, any such commission of inquiry must place the survivors of gender-based violence during and aftermath 1971 at the core of its activities. This would demonstrate that 'centering the marginalised yields otherwise inaccessible theoretical and practical insights to the question of justice'.⁷⁹ For example, while remembering – the violence, crimes and wrongs – is imperative for the public justice agenda, how can it be reconciled with the forgetting that is necessary for some to overcome private distress and enable sheer survival following trauma? Any such commission could consult

⁷⁹ D'Costa, *supra* note 31, at 129.

both gender advisors and the witnesses in gender sensitive spaces to discuss this crucial issue and develop coherent strategies for a gender-sensitised way forward.

In concluding this section, we have two final suggestions to ensure that any chosen processes of accountability and social repair in Bangladesh have a meaningful impact. The first relates to memory and truth. A significant amount of literature on 'truth-telling' suggests that over time, memories become less reliable. Although memories hold important meanings on multiple levels for individuals and their communities, a formal process of accountability requires that testimonies must be as accurate as possible. Guilt must be proven beyond reasonable doubt by way of evidence that is relevant and credible, including witness testimony. This raises particular challenges in relation to sexual violence survivors. For them, forgetting their experiences of sexual violence had been very significant because only through forgetting was their survival possible. Even if the laws and procedures applicable at the tribunal are made gender-friendly, there are going to be women who will not be prepared to remember in a court of law. An inquiry commission which provides a more open and flexible gender-sensitive framework for recalling memories and narratives, may be a more suitable forum than a tribunal which requires detailed recollections backed up, in certain circumstances with supporting evidence.

Second, criminal trials and commissions that rely heavily on dialogue, public hearings and oral testimony must take into account the concept of silence itself. In Bangladesh, war-affected women, especially the *Birangona*, have either remained silent or were silenced in the official history of the nation. While a possible inquiry commission may also not be able to capture these intricacies, it could engage women who are not willing to testify to a court of law, by providing them with alternative means of documenting their experiences of war and easing their own personal recovery.

VI CONCLUSION: POSSIBLE PITFALLS, PROMISES AND POSSIBILITIES

The establishment of the Tribunal marks an opportunity for seeking accountability forty years on. How can we ensure that we do not squander this opportunity? How can we ensure this process meets international standards, and does justice for all, including women victims? How can the Tribunal overcome the major hurdles faced by

women survivors of sexual violence in our everyday domestic criminal justice system – of political influence, of lack of safety and security, of corruption and abuse of process? Will the Tribunal look at the experiences of other institutions and learn lessons? Can women who survived sexual violence in 1971 hope to testify before the Tribunal? How can these hopes be materialised? Will it be able to consider women survivors' narratives of how they were treated not only during the war but afterwards? Will the Tribunal be able to ensure that it does everything within its powers to ensure that this time, women will be accorded full dignity and respect when claiming redress?

These questions, and more, remain to be answered in the months ahead. We hope that whatever lies in store, whether within the framework of the Tribunal, or beyond it through complementary processes, as Bangladeshis, we can finally begin to construct a narrative that does not iconise women or degrade them but seeks to understand what forces in society allowed such atrocities to happen and allows survivors of such violence to claim redress, recognition and respect.

We support the critical importance of undertaking a process of accountability for the crimes of the Bangladesh war of liberation. We believe that atrocities occurred, that there is evidence of this and that perpetrators must be brought to justice. At the same time, we are concerned to see a credible and legitimate process. The Tribunal would be more effective through greater engagement with the lessons learned, as well as of developments in jurisprudence in terms of the investigation and prosecution of international crimes in the decades since the Bangladesh war of liberation took place.

We also believe that an integral and essential part of the justice process is transparency. The Tribunal will be greatly strengthened if there is greater public awareness of its functions. Questions regarding its operations should be considered, addressed and allayed at the outset. It is essential that adequate technical and financial support be given to the Tribunal, its members and the Investigation and Prosecution Teams, to ensure that their impact is assessed not only in terms of the ends, the ultimate outcome of any trial, but also the means used to reach that point. This includes ensuring that their findings and outcomes are made known to the entire nation as the proceedings unfold.